ANUAR JAAFAR & ORS.

v.

ANGELICA FERNANDES

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 68 OF 1984]
17 FEBRUARY 1990

TORT: *Negligence - Between military truck and motorcar - Question of liability - Accident occurred at bend - Allegation by plaintiff that defendant had overtaken a motorcycle and encroached on to plaintiffs path - Two contradictory versions of accident - Review of evidence, submissions and sketch plan - Scratch mark on road - Whether indicator of point of impact - Size of military truck - Width of road - The speed at collision visibility - Effect of.*

CIVIL PROCEDURE: *Production of notes of evidence of another civil suit in present proceedings - Whether prejudicial to plaintiffs - Whether notes are a public document - Was it res judicata.*

On 23 May 1983, there occurred an accident between a military truck and a motorcar. The plaintiffs were all army officers travelling in the said struck, who brought the present action against the defendant driver of the motorcar.

The evidence of the plaintiffs and their witnesses was that the motorcar had encroached onto the path of the military truck, at the scene of the accident which was a bend, immediately after overtaking a motorcycle.

The defendant called 4 witnesses one of them being DW1 the rider of the motorcycle. DW1 stated that no vehicle overtook him at the scene and the accident was at the centre of the road.

The driver of the car, the defendant, denied overtaking any motorcycle just before the collision or encroaching into the other side of the road causing the accident.

There was clearly two contradictory versions of the accident. The case took on an interesting twist when it was adduced by defence Counsel that the defendant, the rider of the motorcycle and his pillion rider had sued the driver of the military truck and the Government of Malaysia, for the same accident for a sum of RM292,987.

It also came to light during the trial that the driver of the military truck had claimed trial to a charge under s. 34A of the Road Transport Ordinance 1958.

Held:

[1] On a review of the evidence, the submission advanced by both Counsel and having regard to the sketch plan, the Court found that it was the military truck which had encroached into the defendant's path suddenly.

[2] The notes of proceedings of the earlier civil suit, where liability had been conceded by the driver of the military truck did not amount to *res judicata* as there had been no adjudication on the merits.

[3] The evidence of the admission of liability by the driver of the military truck in the earlier suit did have some effect on the Court's decision.

[4] The evidence of the 7th plaintiff is suspect, considering his earlier statement to the police.

[5] The difference in speed given by the defendant in her police report and in her testimony should not be the overriding factor to hold that she was not telling the truth and was therefore liable for the collision.

[Order accordingly.]

Legislation referred to:
Road Traffic Ordinance 1958, s. 34A

For the plaintiffs - L.H. Singh; M/s. L.H. Singh & Co. and Darshan Singh of M/s. Darshan Singh Gill & Co.
For the defendant - Sri Kumar; M/s. Tung & Kumar

JUDGMENT

Abdul Malek Ahmad J:

All fifteen plaintiffs who are army officers were travelling as passengers in the military truck Z 7945 from Kuala Kangsar to Ipoh on 23 May 1983 early in the morning when it was involved in a collision at the 32nd kilometre with car AAU 8108 driven by the defendant. As a result, they suffered pain, injuries, loss and damages which had been detailed in the statement of claim and it is only relevant to mention here that their claims for special damages ranged from RM130 for the eighth plaintiff to RM75,573.53 for the seventh plaintiff. It is also relevant to note at this stage that the defendant had filed a claim against the third party namely the driver of the military truck but this had been withdrawn on 14 March 1985.

As is usual in a number of cases, especially running down cases, in this Court in the past, the matter never quite got off the ground despite having been called for hearing on at least ten occasions from 27 July 1984 to 20 April 1989. It finally proceeded on the Court's and the learned Counsel for the defendant's insistence on 30 September 1989 only on the question of liability.

The plaintiffs called three witnesses namely the driver of the military truck, the first plaintiff and the seventh plaintiff. Their evidence tallied on the fact that it was the defendant's motor-car which had encroached into the path of the military truck at the scene, which was a bend, immediately after overtaking a motor-cycle causing the collision.

The driver of the military truck (PW1) testified that both the first and the seventh plaintiffs were seated next to him with the other plaintiffs as passengers at the rear, that it was dark at the time of the accident, that he saw first the lights of a motor-cycle then the lights of a car, that he saw the car overtake the motor-cycle, that he then heard the sound of a collision and at that time he was on his left hand side of the road. After the collision, his vehicle had skidded to the right as he had lost control and it finally rested on the right hand side of the road.

PW1 answered his questions rather cautiously, perhaps a little overly at times and was not able to state with certainty whether his vehicle had also collided with the motor-cycle. He also could not remember several details about the position of the vehicles involved at the time of impact. The first plaintiff (PW2) added that it was foggy at the relevant time, that there was a broken centre white line and that the collision took place half a minute after the defendant's car had overtaken the motor-cycle. He, too, could not recall if the military truck had subsequently collided with the motor-cycle. The seventh plaintiff (PW3) corroborated PW2 on all material details.

The defendant called four witnesses. The first was the rider of the motor-cycle AV 8485 (DW1) which the plaintiffs had alleged she had overtaken just before the accident. DW1 had told the Court that he was riding near to the left edge of the road and had seen the military truck 70 feet away in the opposite direction when it collided with the car and then with his motor-cycle. He also stated that no vehicle overtook him at the scene and that the accident between the military truck and the car was in the centre of the road.

The defendant (DW2) testified that she was driving the said car AAU 8108 that morning with her friend Leela Devi (DW4) from Ipoh to Kuala Kangsar when, on going up the gentle slope just before the bend, something collided into her car causing it to spin around. She was not able to really make out what it was that had knocked into her as it was misty and as the military truck did not have its lights on then. She also denied overtaking any motor-cycle just before the collision or encroaching into the other side of the road causing the accident.

It was at this stage that the learned Counsel for the defendant had produced the notes of evidence in another civil suit before this Court (High Court civil suit 726/83) where the defendant, DW1 and his pillion rider had sued the driver of the military truck and the Government of Malaysia for damages for injuries sustained in the same accident and where the defendants there had conceded liability for a total of RM292,987 on 25 June 1984. Learned Counsel for the plaintiffs had not objected to its production at first but subsequently did so on the grounds that it was prejudicial to the plaintiffs and not related to this suit. I had, however, overruled his objection and admitted the said notes as to my mind it was clear that this is a public document relevant to these proceedings.

The investigating officer (DW3) gave evidence that the accident took place at a bend with the road going uphill from Ipoh and going down again towards Kuala Kangsar. He confirmed that the bulk of the glass pieces was on the left hand side of the road facing Kuala Kangsar and he also produced the statement recorded from the seventh plaintiff (PW3) who had stated that he had only heard the sound of the collision and did not see how the accident took place. DW3 also stated that the driver of the military truck had claimed trial to a charge under s. 34A of the Road Traffic Ordinance 1958 and that one of the passengers in the military truck had died as a result of the accident.

The passenger in the car (DW4) told the Court that she saw something big and black approaching the car just before the collision after which the car spun around and had faced the opposite direction. She corroborated the defendant in that their car did not overtake any vehicle before the accident, that the car was on its left hand side of the road and that the military truck had no lights on.

At the end of the day, the Court was faced with two contradictory versions of the accident with each party claiming that the other had encroached into its side of the road. However, upon a review of the evidence, the submissions advanced by Counsel for both sides and in particular having considered the sketch plan, my finding on the facts was that it was the military truck which had encroached into the defendant's side. I could not accept learned Counsel for the defendant's suggestion that the scratch mark on the road was the point of impact as this is not supported by evidence but the fact that it is on the defendant's side of the road together with the bulk of the glass debris supports the defendant's contention that it was the military truck which had encroached into her side. This view is fortified by the testimony of DW1 who denied categorically that the defendant had overtaken him just before the accident as stated by the driver of the military truck and the first and the seventh plaintiffs who were seated next to him. Considering the size of the military truck, the width

of the road, the speed the collision took place and the visibility in the early hours of the morning, the fact that DW1 had stated that the accident took place in the middle of the road could not imply that it was the defendant who had encroached into the path of the military truck. Taking all the factors stated earlier, and upon a balance of probabilities, my conclusion was that it was the military truck that had encroached into the defendant's path suddenly.

Learned Counsel for both parties had also agreed that the notes of proceedings in the related suit (D3) where liability was conceded by the driver of the military truck without any trial did not amount to *res judicata* as there had been no adjudication on the merits and this Court should only confine itself to the evidence in this case. However, in my view, it had to have some effect on my decision as the fact that the driver of the military truck and the Government of Malaysia could admit liability for damages agreed at close to RM300,000 in a case involving three vehicles with the sixteen passengers in the military truck sustaining somewhat major injuries including one fatality, can only point to the fact that my finding on the liability of the parties in this case on the evidence adduced must be correct in the circumstances. This is so despite my disregarding the fact that the evidence of the seventh plaintiff is suspect considering his earlier statement to the police (D4) which point I feel I cannot consider as the seventh plaintiff was never questioned on the statement when he gave evidence. I was also of the view that the differences in speed given by the defendant in her police report (D2) and in her testimony, made much ado of by learned Counsel for the plaintiffs, should not be the overriding factor to hold that she was not telling the truth and was therefore liable for the collision.

Consequently, I found the defendant not liable for the accident and dismissed the plaintiffs' claim with costs. Since the parties had only asked the Court to consider the question of liability and no evidence had been led to as regards quantum, I saw no necessity to consider the question of quantum in the event my decision is held to be in error on appeal.

Also found at [1990] 1 CLJ 909